Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

The Jurisdictional Statements filed herein present a number of substantial issues requiring full briefs and oral argument. Appellees fail to address themselves to any of those issues. Instead, they rely upon some broad assertions which do not stand up under analysis.

First, appellees assert that *North Georgia Finishing Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 43 L.W. 4192, "should

be dispositive of this case". The Georgia statute is hardly analogous to the New York statute. It is plain that under the Georgia statute, the plaintiff completely controls the procedure for obtaining and maintaining a seizure of defendant's property through the rendition of judgment on the merits of the action. The procedure, from inception through judgment, is entirely lacking in statutory controls, judicial supervision or input or any opportunity by the defendant to vacate the writ.[1] To obtain a writ, a plaintiff or his attorney need only submit the most skeletal perfunctory affidavit, conclusory in form and completely devoid of allegations of evidentiary facts.[2] Submission of the affidavit is made to a non-judicial clerk whose ministerial duty it is to issue the writ. The writ then stands inviolate unless and until the defendant obtains a judgment on the merits after a plenary trial.

It is difficult to perceive the logic of the argument that the declaration of the unconstitutionality of the Georgia statute is "dispositive of this case". The New York statute provides a procedure under which judicial supervision jealously guards the rights of a defendant both upon the initial application for attachment and thereafter throughout the entire attachment procedure. The New York procedure (in contrast to the Georgia procedure and, indeed, even the Louisiana procedure[3]) requires the plaintiff to present for consideration and review by a judge of a court an affidavit and other written evidence showing that there

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[1] The sole course open to a defendant in Georgia is to post a bond as substitute security. Ga. Code Ann. § 46-401. He has no opportunity prior to judgment to challenge the *bona fides* of the writ itself.

[2] See fn.2 to Justice White's opinion in *North Georgia* at 43 L.W. 4193 where such an affidavit is set forth in its entirety.

[3] See opinion of Justice Stewart dissenting in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) at page 629, in which he points out that the requirement of affidavit in Louisiana is satisfied by "*pro forma* allegations".

is a cause of action and that grounds for attachment exist (New York CPLR 6212(a)). The plaintiff has the burden of proving by his evidentiary submissions a *prima facie* case (a) that he has a cause of action and (b) that he has valid grounds for attachment (see decisions cited at page 10 of the Curtis and Continental Jurisdictional Statement). Only upon the determination of the judge to whom such evidence has been submitted that such a *prima facie* case has been made, will the order of attachment issue. The defendant then has the right to an immediate hearing by moving to vacate the attachment (CPLR 6223).[4]

Upon the hearing, the judge[5] determines whether the plaintiff has carried the burden of making out a *prima facie* case (a) that he has a cause of action and (b) that he has grounds for attachment. If the defendant presents no new evidence, the determination will be based upon the evidence already presented by the plaintiff. If the defendant presents his own evidence, the determination will be

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[4] At page 4 of appellees' brief, a highly selective portion of this section is quoted in an effort to perpetuate the erroneous conclusion of the District Court below that the only ground upon which a defendant may have a hearing is "that the attachment is unnecessary to the security of the plaintiff". A reading of the entire section as well as the Legislative Studies pertaining to the same and the decisions of the New York courts demonstrates that the defendant can move to vacate on *any* ground showing plaintiff's lack of entitlement to an attachment. See fn.2 at page 11 of the Jurisdictional Statement filed by Curtis and Continental.

[5] In New York County (where the attachment in this case originally issued), in Westchester County (where the same State Court action is presently pending by virtue of a change of venue sought and obtained by appellees) and in other populous counties in the State of New York, the judges are assigned to Special Term Parts and rotate in such assignments typically on a weekly basis. One of such parts is designated for *ex parte* motions and another of such parts is designated for motions on notice. Consequently, the hearing on a motion to vacate almost always comes on before a judge other than the one who issued the order in the first instance and a defendant can guarantee a hearing by a new judge by the timing of his motion.

based upon the entire record before the judge. In this procedure, the burden of proof is always upon the plaintiff (see cases cited at page 10 of the Curtis and Continental Jurisdictional Statement).

Second, in a tortured effort to bring this case into the sphere of *North Georgia,* appellees assert that the New York statute "makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted . . . ." (Appellees' Brief page 9). The assertion is either most patently erroneous (as New York CPLR 6223 clearly affords defendant the right to an immediate hearing) or, at best for appellees, it completely ignores one of the most substantial issues on this appeal: whether the hearing, in the context of the entire New York statutory scheme, satisfies due process. The decision in *North Georgia* is clearly irrelevant to any determination of that issue. Georgia, unlike New York, literally had "*no* provision . . . for *any* hearing".

The keystone of the District Court's decision is its finding that defendant has the burden of proof on the hearing to vacate an attachment. This finding is based upon some very serious misapprehensions, *inter alia,* a misapprehension of the language of CPLR 6223 (see fn.2 at page 11 of the Jurisdictional Statement filed by Curtis and Continental), a misapprehension of the interpretation of that section by the New York courts (see page 10 of the Jurisdictional Statement filed by Curtis and Continental), and an apparent confusion in distinguishing "burden of proof" from "burden of going forward" (*id*). If in fact there be no substantial issue arising out of this phase of the District Court decision, then disposition of the case at this stage would require reversal, not affirmance. If there be a substantial issue, then full briefs and oral argument are required.

Finally, appellees have not addressed themselves to other substantial issues raised in the Jurisdictional Statements filed herein, e.g., whether a vendor's lien is a *sine qua non* of due process in pre-judgment seizures or whether fraud can ever form the basis for a pre-judgment seizure.[6]

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[6] At fn.5, p. 9 of their brief, appellees assert, ". . . The Georgia statute . . . similar to the Louisiana statute upheld in *Mitchell* . . . 'requires plaintiff to file a bond in a sum double the amount sworn to be due' ". The Louisiana statute has no such requirement (see La.C.C.P. Art. 3506). Rather, similar to the New York statute, the court in Louisiana fixes the amount of the bond.

At fn.3, p. 4 of their brief, appellees lament that, in order to discharge the attachment, they would have to post a bond for the value of the property attached, which would be in an amount almost thrice that required of the plaintiff to obtain the attachment. There is little logic to this complaint. The amount of plaintiff's bond is designed to secure the defendant for damages for wrongful taking. The amount of defendant's bond is designed to substitute for the security under attachment which the defendant is permitted to take into its hands. It should also be noted that at any stage of the proceeding before the attached property is applied to a judgment, a defendant can obtain additional security for damages in the event of wrongful taking. CPLR 2508.

At fn.6, p. 10 of their brief, appellees complain about the length of time between commencement of the State action and its placing upon the trial calendar. It ill-behooves appellees to complain of this circumstance as:

> (1) Appellees consistently delayed completion of pretrial discovery proceedings and were twice compelled by orders of the State Court to appear to continue such discovery proceedings;
>
> (2) Appellees made a motion in the State Court to stay all further proceedings in the State action pending determination of their constitutional attack in the Federal Court; and
>
> (3) When the case was placed on the calendar for trial, appellees made a motion in the State Court to strike it from the calendar.

CONCLUSION

The substantial questions presented in the Jurisdictional Statements filed have not been determined, nor are they directly affected, by this Court's decision in *North Georgia Finishing Inc.* v. *Di-Chem Inc.* The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Dated: New York, New York, February 10, 1975.

Respectfully submitted,

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